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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion and order of the district court entered on February 24, 1968 (App. A, *infra*, pp. 12–32), and the supplementary orders entered on March 2, 1968 (Apps. B and C, *infra*, pp. 33–43, 44–46), are not reported. The majority opinion of the court of appeals panel (App. D, *infra*, pp. 47–66) is reported at 400 F. 2d 1; the dissenting opinion (App. E, *infra*, pp. 67–70) is not yet reported. The orders of the court of appeals denying rehearing and denying rehearing *en banc* and the opinion dissenting from the denial of rehearing *en banc* (App. F, *infra*, pp. 71–80) are not yet reported.

JURISDICTION

The order of the court of appeals denying rehearing *en banc* was entered on November 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a school district which is under a constitutional obligation to desegregate its students and faculties, and which has taken inadequate steps under a prior general order to desegregate, the district court properly required the achievement of a distribution of faculty members such that all schools would have approximately the same proportion of white and Negro teachers.

STATEMENT

1. *The decision of the district court.* This school desegregation suit was brought in the Middle District of Alabama by Negro parents and school children in 1964. The district court *sua sponte* named the United States *amicus curiae* with the rights of a party.[1] After a hearing, the district court found that the defendant school board operated a racially segregated school system and, on July 31, 1964, entered its original decree requiring desegregation. A more comprehensive desegregation plan was required by an order of March 22, 1966. The latter order specifically directed the school board to hire and assign teachers on a nonracial basis and to take affirmative steps "to

[1] There has never been any challenge by respondents to the authority of the district court to take this step. In any event, the United States is now authorized to intervene in the suit under Section 902 of the Civil Rights Act of 1964, 42 U.S.C 2000h-2.

solicit and encourage teachers" to transfer to desegregated positions and "to eliminate the effects of past [faculty] discrimination." However, for purposes of uniformity within the State and Circuit, that order was amended on August 18, 1966, in light of the court of appeals' decision in *Davis* v. *Board of School Commissioners of Mobile County*, 364 F. 2d 896 (C.A. 5) to allow the school board "until the school year 1967–68 to end this present policy of hiring and assigning teachers and other school personnel according to race." On June 1, 1967, the district court entered a decree specifically requiring faculty desegregation in the language of the model decree formulated by the Fifth Circuit in *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, adopted on rehearing *en banc*, 380 F. 2d 385, certiorari denied, 389 U.S. 840.

On August 17, 1967, and February 7, 1968, the United States filed motions, in which the private plaintiffs joined, seeking further faculty desegregation.[2] After hearings on these motions, the district court found that of the 550 Negro and 815 white teachers in the system only 32 were on faculties where their race was in the minority, most of them assigned to teaching high school grades within the city of Montgomery. The court noted that "little, if any," faculty desegregation had occurred in the system's schools outside the city itself. After the entry of the 1967 order to desegregate faculties, 75 newly hired teachers had been assigned or transferred to faculties

[2] The motion of February 7, 1968, also sought the desegregation of the athletic program, but that issue was not involved in the appeal and is not raised here.

where their race was in the majority. Of the 26 white and 6 Negro teachers hired during the first half of the 1967-68 school year, six white teachers had been assigned to schools predominantly of another race. No desegregation of the substitute teachers, student teachers or night school faculties had occurred and none had been planned.

Finding that "the defendants have failed to discharge the affirmative duty the law places upon them to eliminate the operation of a dual school system," the district court concluded that it was "necessary and entirely appropriate to establish now more specific requirements" (p. 20, *infra*). In an order entered on February 24, 1968, the district court directed the school board, as an "ultimate objective" in disestablishing faculty segregation, to "be guided by the ratio of Negro to white faculty members in the school system as a whole" and ordered the board to achieve a racial ratio at each school which would be "substantially the same" as the racial ratio of teachers throughout the system. The district court required specific partial compliance for 1968-69, but denied the government's request that the ultimate ratio be implemented immediately in three schools being opened for the first time.

2. *The decisions of the court of appeals.* The school board appealed and the plaintiffs and United States cross-appealed from the denial of the request for the immediate complete desegregation of faculties at newly opened schools. A panel of the court of appeals (Judge Thornberry dissenting) modified that part of the district court's order which set forth the ultimate objective. It held that the standard of "good faith

and effective effort" was sufficient on the grounds that a proportional requirement would not permit consideration of "the availability of teaching personnel, sound school administrative procedure, and other important factors," and because the entry of any more specific order would be "to tinker with the model decree" of the *Jefferson case* (pp. 60-63, *infra*).

Petitions for rehearing and for rehearing *en banc* were denied by the panel and by a 6-to-6 vote of the active circuit judges.

REASONS FOR GRANTING THE WRIT

1. The standard for faculty desegregation ordered by the district court—that each school's faculty have approximately the same proportion of white and Negro teachers (*i.e.*, that each reflect the racial distribution of teachers throughout the school system)—is the appropriate yardstick for measuring whether proven faculty segregation has been disestablished. The constitutional requirement is that the dual school system be eliminated, and this includes the dual system of racial faculty assignment. Nothing less is required than (1) "that the pattern of teacher assignment to any particular school not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school," *United States* v. *Jefferson County Board of Education*, *supra*, 380 F. 2d at 394, and (2) that the faculty of each school be placed approximately in the condition it would have had if the assignments of teachers had always been made without reference to race.

The approximate proportional formula ordered by the district court would accomplish these twin goals.

The racial indentifiability of school facilities would be erased because the racial make-up of all faculties would be substantially alike. Moreover, the resulting racial proportions would approximate the racial composition that would have resulted from a nonracial random distribution of teachers in the past, and would thereby constitute total disestablishment of faculty segregation.[4]

We emphasize that the standard adopted by the district court was to be utilized only in undoing the present consequences of past unconstitutional assignment. It was not suggested or adopted as a requirement for school districts which have not practiced racial segregation in the past. Nor was it intended as a means of achieving racial balance in school faculties.

We also note that there is no constitutional or legal infirmity in requiring a school board to consider race in order to overcome prior racial discrimination.[4] In

[4] Such an ultimate objective for eliminating the effect of past racial assignments does not, of course, foreclose adjustment for educational or administrative factors such as availability of personnel. All that would be required is that, as the district court ordered, the proportion be "*substantially* the same." This is not an inflexible ratio, and in those instances where exceptions would be justified, such exceptions could be provided for.

"* * * It would be stultifying to hold that a board may not move to undo arrangements artificially contrived to effect or maintain segregation, on the ground that this interference with the status quo would involve 'consideration of race.' When school authorities, recognizing the historic fact that existing conditions are based on a design to segregate the races, act to undo these illegal conditions—especially conditions that have been judicially condemned—their effort is not to be frustrated on the ground that race is not a permissible consideration. * * *" *Wanner* v. *County School Board of Arlington County*, 357 F. 2d 452, 454 (C.A. 4).

devising a remedy to erase the racial identity of "white" and "Negro" faculties and to disestablish the state-created pattern of racially segregated faculty assignments, race may be taken into consideration. *Wanner* v. *County School Board of Arlington County*, 357 F. 2d 452 (C.A. 4); *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 876 (C.A. 5), adopted on rehearing *en banc*, 380 F. 2d 385, certiorari denied, 389 U.S. 840.

2. The rejection of the district court's objective standards and the substitution of the standard of "good faith and effective effort" conflicts with this Court's holding in *Green* v. *County School Board*, 391 U.S. 430, 439, that an acceptable desegregation plan must be one that "promises realistically to work *now*." This Court has held that faculty desegregation is an appropriate component of a school desegregation plan, and that students in public schools have a constitutional right to attend schools where faculties have not been assigned on the basis of race. *Bradley* v. *School Board*, 382 U.S. 103; *Rogers* v. *Paul*, 382 U.S. 198. The test adopted by the panel of the court of appeals does not insure that desegregation will be achieved promptly. Rather, it provides added opportunities for more extended delay in faculty desegregation. As stated in the dissent from denial of rehearing, the district court's standard was rejected by the panel "under the vague notions which permit subjective discrimination of the kind so characteristic of the regional glacial movement toward integration" (p. 79, *infra*).

3. The questions presented warrant review because of the substantial uncertainty engendered by the decision below. Within the Fifth Circuit, which includes six of the States most affected by this Court's school desegregation decisions, the 6-to-6 division of the court of appeals has left unresolved the judicial acceptability of the district court's remedy. As pointed out in the dissent from the denial of the rehearing, the acceptance of the district court standard would contribute to the circuit-wide uniformity which the Fifth Circuit deemed desirable in *United States* v. *Jefferson County Board of Education*, *supra* (pp. 73, 79-80, *infra*). In *United States* v. *Board of Education of the City of Bessemer*, 396 F. 2d 44 (C.A. 5), the court of appeals set 1970 as the date for complete faculty desegregation. The uncertainty caused by the even division of the court below, added to the vagueness of the standard adopted by the panel, will render it difficult, if not impossible to achieve "complete" faculty desegregation at any time—much less by 1970.

Moreover, the issue presented by this case is of substantial importance in other circuits. It is a matter that concerns virtually all school desegregation cases, in the North as well as in the South. See, *e.g.*, *United States* v. *School District 151 of Cook County, Illinois*, 286 F. Supp. 786, 798 (N.D. Ill.). For even school districts which have not practiced racial segregation in the assignment of students may have assigned teachers on a racial basis and may, therefore, have to institute remedial measures.

4. The decision of the panel below conflicts with decisions of courts of appeals for three other circuits.

Both the Tenth and the Fourth Circuits have approved school desegregation plans which require, as a remedy to eliminate faculty segregation, "the same approximate percentage of non-white teachers in each school as there now is in the system." *Dowell* v. *School Board of Oklahoma City*, 244 F. Supp. 971, 978 (W.D. Okla.), affirmed, 375 F. 2d 158, 167 (C.A. 10), certiorari denied, 387 U.S. 931; *Coppedge* v. *Franklin County Board of Education*, 273 F. Supp. 289, 300 (E.D. N. Car.), affirmed, 394 F. 2d 410 (C.A. 4). The Court of Appeals for the Eighth Circuit has declined to require such a formula, but has suggested its use as a standard "which comports with *Brown*." *Kelly* v. *Altheimer School District No. 22*, 378 F. 2d 483, 498, n. 24.[8]

5. The decision of the panel significantly weakens the authority of district courts to use their equitable powers, as contemplated by this Court in *Brown* v. *Board of Education*, 349 U.S. 294, 300–301, to fashion

[8] Another district court in the Fourth Circuit has used this same proportional standard, pointing out that "Such a guideline can not be rigorously adhered to, of course, but the existence of some standard is necessary in order for the Court to evaluate the sufficiency of the steps taken by the school authorities pursuant to the Court's order." *Kier* v. *County School Board of Augusta Co.*, 249 F. Supp. 239, 247 (W.D. Va.).

In *Parborough* v. *Hubert-West Memphis School District No. 4*, 380 F. 2d 962, 968, the Court of Appeals for the Eighth Circuit, expressing its confidence in the trial judge, declined to *require* the *Dowell* formula, "although not without some hesitation."

and effectuate decrees necessary for the elimination of dual public school systems. The district court has the obligation "to assess the effectiveness of a proposed plan in achieving desegregation" and to see to it "that state-imposed segregation has been completely removed." *Green* v. *County School Board, supra,* 391 U.S. at 439. The measure taken by the district court in this case was an appropriate one to achieve these objectives.

The district court found that only 2.4 per cent of the teachers (in a system where the ratio of white to Negro teachers was approximately 3 to 2) were teaching on faculties where their race was in a minority. This was true despite the fact that the school system had been under an obligation to desegregate since 1954, and under court orders to do so since 1964, including a 1967 order specifically requiring the nonracial assignment of teachers and the elimination of past faculty segregation. The associate superintendent himself testified in the district court hearing, as quoted in the court of appeals panel opinion (pp. 57–58, *infra*) that he did not know what was required to achieve faculty desegregation. In light of this evidence and testimony, the district court properly concluded that a clearly stated objective was necessary. That conclusion should not have been disturbed by the court of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1968.

APPENDIXES

APPENDIX A

In the United States District Court for the Middle District of Alabama, Northern Division

ARLAM CARR, ET AL., PLAINTIFFS

v.

MONTGOMERY COUNTY BOARD OF EDUCATION; JAMES W. RUTLAND, JR., FRED BEAR, GEORGE A. DOZIER, DR. J. EDWARD WALKER, ISABELLE B. THOMPSON AND DR. ROBERT PARKER, MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION; AND WALTER MCKEE, SUPERINTENDENT OF EDUCATION OF MONTGOMERY COUNTY, ALABAMA, DEFENDANTS

UNITED STATES OF AMERICA, AMICUS CURIAE.

Civil Action No. 2072–N

MEMORANDUM OPINION

This cause is now submitted upon the motions of the United States filed August 17, 1967 and February 7, 1968, in both of which the United States requested this Court to require defendants to take further steps designed to disestablish the dual school system in Montgomery County, Alabama. Each of these motions seeks further faculty desegregation and the motion of February 7, 1968, asks this Court to require defendants to cease operation of their athletic program on a racially segregated basis and to take other steps designed to

insure that certain new schools that have been and are being constructed as a part of the Montgomery County School System are operated on a desegregated basis. The plaintiffs join the United States in each of said motions.

This Court conducted a hearing on the Government's motion of August 17, 1967, in September, 1967. No formal findings or conclusions were made at that time by reason of the fact that the 1967–68 school year had already commenced, and the matter was therefore held in abeyance. On February 9, 1968, a hearing was conducted on the Government's second motion and the motion of the plaintiffs filed the same date wherein the plaintiffs seek more specific relief concerning transportation to the new schools.

Upon consideration of the evidence and the several exhibits thereto, this Court now makes the appropriate findings of fact and conclusions of law, embodying the same in this memorandum opinion. The original decree requiring desegregation of the public schools in Montgomery County, Alabama, was entered by this Court on July 31, 1964. After making appropriate findings and conclusions to the effect that the Montgomery County Board of Education was operating a segregated school system based upon race, this Court entered an injunction that enjoined the defendants from failing to provide public school education for Negroes, and other members of their class, in a school or schools that were not operated on a racially segregated basis, and from failing to take immediate steps, to be effective for the school term commencing September, 1964, to desegregate the 1st, 10th, 11th and 12th grades in the public schools of Montgomery County, Alabama. In this decree, this Court approved a freedom-of-choice plan that had been proposed by the defendants as a means for discharging the affirm-

ative duty placed upon them. *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954), and *Brown* v. *Board of Education of Topeka*, 349 U.S. 294 (1955). On March 22, 1966, this Court by formal order required the Montgomery County Board of Education to file a more formal and comprehensive plan for desegregation of the public school system in Montgomery County. This plan provided for complete desegregation of the schools for each grade in each school commencing with the September, 1967 school term; the plan also provided with regard to services, facilities, activities and programs:

> A student shall have full access to all services, facilities, activities, and programs (including transportation, athletics, and other extracurricular activities) that may be conducted or sponsored by, or affiliated with the schools of the system. A student attending school for the first time on a desegregated basis may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer student.

Further, the plan provided with regard to faculty and staff:

> Race or color will henceforth not be a factor in the hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination. Teachers, principals, and staff members will be assigned to schools so that the faculty and staff is not composed of members of one race.
>
> In the recruitment and employment of teachers and other professional personnel, all applicants or other prospective employees will be informed that Montgomery County operates a

racially integrated school system and that members of its staff are subject to assignment in the best interest of the system and without regard to the race or color of the particular employee.

The Superintendent of Schools and his staff will take affirmative steps to solicit and encourage teachers presently employed to accept transfers to schools in which the majority of the faculty members are of a race different from that of the teacher to be transferred.

Teachers and other professional staff will not be dismissed, demoted, or passed over for retention, promotion, or rehiring on the ground of race or color. In any instance, where one or more teachers or other professional staff members are to be displaced as a result of desegregation or school closings, they shall be transferred to any position in the system where there is a vacancy for which they are qualified.

At the time this Court entered its order in July, 1964, there were in attendance approximately 15,000 Negro children and approximately 25,000 white children in the Montgomery County School System. The system was completely segregated by reason of race. No faculty desegregation was ordered until the commencement of the 1967 school year.[1] The evidence

[1] The order made and entered in this case on March 22, 1966, required the Montgomery County Board of Education to commence the process of desegregating the faculty and professional staffs commencing with the school year 1966–67. However, on August 16, 1966, in the Mobile, Alabama school case of *Birdie Mae Davis, et al.* v. *Board of School Commissioners of Mobile County, et al.*, 364 F. 2d 896, the United States Court of Appeals for the Fifth Circuit allowed the Mobile, Alabama County Board of Education until the school year 1967–68 to end its policy of hiring and assigning teachers and staff according to race. On August 18, 1966, this Court entered an order reciting, "Uniformity, as well as fairness, requires this Court upon its

now presented reflects that during the current school year the student population continues to be about the same as in 1964 and there are now approximately 550 Negroes attending, through the freedom-of-choice procedure, traditionally white schools. No white children are attending traditionally Negro schools. As of February 9, 1968, 32 classroom teachers in this system were teaching pupils in schools that are predominantly of the opposite race. Defendants employ approximately 550 Negro teachers and approximately 815 white teachers in the system. Practically all the faculty desegregation in the system has occurred in the high schools. While there is some faculty desegregation in the elementary schools in the system, it is extremely small. There has been very little, if any, faculty desegregation in the schools located outside the City of Montgomery.

Since the order of this Court of June 1, 1967, defendants have assigned or transferred approximately 75 new teachers to faculties where their race was in the majority. Since the opening of school in September, 1967, defendants have hired approximately 32 new teachers—26 white and 6 Negro. Of the 26 new white teachers, only six or seven have been placed in predominantly Negro schools. All six Negroes were assigned to predominantly Negro schools. The evidence further reflects that the defendants have failed to take any appropriate steps to insure that substitute teachers are placed on a nonracial basis. No Negro has yet been a substitute teacher in a traditionally white school in Montgomery County.

own motion . . . to amend its order of March 22, 1966, to the extent that the Montgomery County School Board of Education be allowed until the school year of 1967-68 to end this present policy of hiring and assigning teachers and other school personnel according to race."

Negro substitutes were used over 1,500 times in Negro schools during the first semester of the 1967-68 school year. During the same period, white substitute teachers were employed over 2,000 times, only 33 of them in traditionally Negro schools. There are approximately 162 white substitute teachers and 63 Negro substitute teachers available for use in the Montgomery County School System. Twenty-eight of the white substitute teachers whose names are on this list have, with defendants' permission, limited themselves to working only in predominantly white schools. Defendants have adopted no adequate program for the assignment of student teachers on a desegregated basis. None of the approximately 150 student teachers used in the Montgomery County School System in the fall of 1967 were assigned to schools predominantly of the opposite race. Four Negro student teachers have very recently been assigned to predominantly white schools. There has been no faculty desegration in the night schools operated by the Montgomery County School System.

The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year of 1968-69.

The evidence in this case reflects that the athletic programs are an integral part of the operation of the public schools in the Montgomery County School System. The Alabama High School Athletic Association is an association made up of approximately 357 Alabama high schools traditionally maintained for white students and the Alabama Interscholastic Athletic Association is an association made up only of Alabama

high schools traditionally maintained for Negro students. Each of these athletic associations has adopted rules for the scheduling of athletic contests by its members which have the effect of penalizing member schools if they play athletic contests with schools predominantly of the opposite race. The manner in which these associations accomplish this is through the promulgation of a rule to the effect that if any member school plays a nonmember school, it is subject to suspension or penalty. Thus the Montgomery County Board of Education, acting through its various school principals and coaching staffs, has allowed its traditionally white schools and its traditionally Negro schools to become members of the white and Negro associations, respectively, thereby placing them under the restrictive rules of these associations. Furthermore, the evidence reflects that the defendants through their agents—the principals and coaching staffs—have adopted a policy of scheduling interscholastic athletic contests for its traditionally white schools only with other traditionally white schools, and for its traditionally Negro schools, only with other traditionally Negro schools. The evidence in this case is clear that this manner of operating the athletic programs has had and continues to have the effect of influencing the choice of students within the system.

The evidence further reflects that the defendants have continued to construct new schools and expand some existing schools; certainly, there is nothing wrong with this except that the construction of the new schools with proposed limited capacities geared to the estimated white community needs and located in predominantly white neighborhoods and the expansion of the existing schools located in predominantly Negro neighborhoods violate both the spirit and the letter of the desegregation plan for the Montgomery County

School System. Examples of this are the construction of the Jefferson Davis High School, the Peter Crump Elementary School and the Southlawn Elementary School—all in predominantly white neighborhoods—and the expansion of Hayneville Road School and the Carver High School, both in predominantly Negro neighborhoods. The location of these schools and their proposed capacities cause the effect of this construction and expansion to perpetuate the dual school system based upon race in the Montgomery County School System.

As to transportation, the defendants have failed to eliminate the bus routes where there exists overlapping and duplication based upon race. Thus the defendants have continued to perpetuate the dual school system through their transportation system. The defendants in designating three new schools located in predominantly white neighborhoods, viz., Jefferson Davis High, Peter Crump Elementary and Southlawn Elementary, as "nontransported" schools (schools to which no transportation is provided) are also attempting to further perpetuate the dual school system.

One of the most aggravating courses of conduct on the part of the defendants and their agents and employees relates to the new Jefferson Davis High School to be located in the City of Montgomery and operated commencing with the school year 1968–69. The defendants in locating this school placed it in a predominantly white section of Montgomery. The evidence reflects that in determining the capacity of the school the approximated the number of white students residing in the general vicinity and constructed the school accordingly; they have adopted a school name and a school crest that are designed to create the impression that it is to be a predominantly white school; they have hired a prihcipal, three coaches and a band

director, all of whom are white; they have actively engaged in a fund-raising campaign for athletic and band programs only through white persons in the community; they have contacted only predominantly white schools for the scheduling of athletic events and they have made tentative arrangements to join the Alabama High School Athletic Association—the white association. Extensive publicity has been released concerning the white faculty members and the football schedule with all white schools. Discussion of the athletic program has been held by the new school officials only with white athletes. The dissemination of information about spring football practice in pamphlet form has been made by the school staff only to white persons.

All of this means that the defendants have failed to discharge the affirmative duty the law places upon them to eliminate the operation of a dual school system. Under such circumstances this Court considers it necessary and entirely appropriate to establish now more specific requirements governing minimum amounts of progress in the future in these several areas. In establishing these rules, it should be emphasized that strong consideration is given to the ratio of white to Negro students; however, in view of the fact that the plaintiffs and the United States have as of February 21, 1968, filed a motion to supplement the March 22, 1967, order of the three-judge court in *Lee, et al.* v. *Macon County Board of Education, et al.*, 267 F. Supp. 458, in the area of school athletic programs, this Court will not at this time make any further specific findings, conclusions or order concerning the dual athletic program operated by the Montgomery County School System and will not at this time outline any steps that the defendants may be required to take in order to eliminate such

practice. This phase of the matter as now presented will be reserved pending hearing and disposition of the motion in *Lee, et al.* v. *Macon County Board of Education, et al.*, which is presently scheduled for a hearing March 9, 1968.

The manner in which the defendants have constructed new schools, the location and proposed capacity of these schools, and the manner in which the defendants have expanded Negro schools and the location of these Negro schools make it clear that the effect of these new constructions and the effect of the expansions have been designed to perpetuate, and have the effect of perpetuating, the dual school system in the Montgomery County schools. Furthermore, the operation of the school bus routes as presently operated by the defendants continues to violate the Fourteenth Amendment of the Constitution. Because of these factors this Court is under a duty and an obligation to outline and specify certain affirmative steps that must be taken by the defendants to eliminate the dual school system based upon race and to overcome the effects of certain efforts that have been made, as above outlined, to perpetuate this dual school system.

In implementing the requirements of this Court's orders heretofore made in this case and the supplemental requirements outlined herein and in the attached supplemental desegregation plan, the Montgomery County School Board, the individual members thereof, and particularly the principals of the several schools should be guided by three *caveats:*

First, the law will not tolerate any further undue delay in the desegregation of the public school systems. It has been almost fourteen years since school boards were placed under an affirmative duty to disestablish their dual school systems based upon race.

Brown v. *Board of Education of Topeka, supra.* The Courts have recently—particularly in the Fifth Circuit—emphatically stated that no further delays in the desegregation process would be allowed. This was recognized and reaffirmed by the three-judge court in *Lee* v. *Macon, supra,* in its order of April 15, 1967 (unreported), when it was stated:

> Further delay in the desegregation of Alabama public schools is inconsistent with existing law. The Supreme Court of the United States in *Goss* v. *Board of Education,* 373 U.S. 683 (1963), stated: "Delays in desegregating school systems are no longer tolerable." See also *Calhoun* v. *Latimer,* 377 U.S. 263; *Watson* v. *City of Memphis,* 373 U.S. 526, and *Bradley* v. *School Board of City of Richmond,* 382 U.S. 103 (1965). The law is clear that state authorities are "duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system." *Cooper* v. *Aaron,* 358 U.S. 1, 7. Following this philosophy, the United States Court of Appeals for the Fifth Circuit has refused to permit delay in this area. *Davis* v. *Board of School Commissioners of Mobile County, Alabama,* 322 F. 2d 356 (1963); *Singleton* v. *Jackson Municipal Separate School District,* 348 F. 2d 729 (1965); *United States* v. *Wilcox County Board of Education,* 366 F. 2d 769 (1966):

Second, in the area of desegregating the faculties and staffs in the several schools in the system, the defendants may not justify or excuse any further delay upon the ground that some of the teachers are reluctant to teach in schools predominantly of the opposite race. Again, the controlling legal principle in connection with this phase of the problem was announced by the three-judge court in *Lee* v. *Macon, supra,* in its order of June 14, 1967 (unreported),

wherein the Court stated that desegregation of facilities and staffs must be accomplished "either by inducing voluntary transfers by teachers, the filling of vacancies, or, if they cannot achieve faculty desegregation by such means, then by the assignment and transfer of teachers from one school to the other."

Third, that unless the "freedom-of-choice" plan is more effectively and less dilatorily used by the defendants in this case, this Court will have no alternative except to order some other plan used. Caution in this area of the problem was expressed by the three-judge court in *Lee* v. *Macon, supra,* in its order of March 22, 1967, when it stated:

> Invariably in this area of our country the "freedom-of-choice" plan has been chosen by the courts and the school systems themselves as the method to effectuate the requirements of the Fourteenth Amendment in the field of desegregation of public educational facilities. This is the plan which this Court will require—for the time being—these defendant officials to implement throughout the State of Alabama.[27] This Court recognizes that in the freedom-of-choice plan there are many administrative complexities. It may be that these administrative problems will make some other method advisable in the future. It may well be that the freedom-of-choice method of desegregation will not fully and completely disestablish the dual public school system based upon race.[28] However, for the time being, provided that all of the factors designed to influence and having the effect of influencing choice be eliminated, the freedom-of-choice plan will be put into effect upon a statewide basis. It should be emphasized that, if choice influencing factors are not eliminated, freedom of choice is a fantasy. A "freedom-of-choice" plan ordered by a court or adopted by school authorities is not an end in itself; it

is but a means to an end. The plan must operate in such a manner as to meet the constitutional mandate of the Fourteenth Amendment. As was stated in the concurring opinion in *Bradley* v. *School Board*, 345 F. 2d 310, 323:

> Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, "you now have a choice." In many instances the choice will not be meaningful unless the administrators are willing to bestow extra effort and expense to bring the deprived pupils up to the level where they can avail themselves of the choice in fact as well as in theory * * * The district judge must determine whether the means exist for the exercise of a choice that is truly free and not merely pro forma.

[21] The reasons are obvious why school officials have not chosen other plans such as the "neighborhood school" plan, for under such a plan white students would be immediately required to attend Negro schools located in their neighborhoods.

[22] The United States Supreme Court has not yet ruled on the freedom-of-choice method of ending racial segregation in the field of public education. However, *Goss* v. *Board of Education*, 373 U.S. 683 (1963), has been cited as support for such a plan. See *Bradley* v. *School Board*, 345 F. 2d 310, 318 (4th Cir. 1965).

Several "freedom-of-choice" plans for desegregating dual school systems based upon race have recently been found as "not operating in a constitutionally acceptable manner." *Coppedge* v. *Franklin County Board of Education* (E.D. N.D. Aug. 1967), 273 F. Supp. 289, and *Moses* v. *Washington Parish School Board* (E.D., La., Oct. 19, 1967), 276 F. Supp. 834.

In accordance with the foregoing, it is the Order, Judgment and Decree of this Court that the defend-

ants, their agents, officers, employees and successors, and all those in active concert or participation with them, shall adopt and implement the attached supplement to the desegregation plan herein ordered on June 1, 1967.

This Court specifically retains jurisdiction of this cause.

Done, this the 24th day of February, 1968.

FRANK M. JOHNSON, JR.,
United States District Judge.

SUPPLEMENT TO DESEGREGATION PLAN

I. FACULTY AND STAFF

A. *Statement of Objective.*

In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.

The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2. This will be accomplished in accordance with the schedule set out below.

B. *Schedule for Faculty Desegregation.*

1. *1968–69.* At every school with fewer than 12 teachers, the board will have at least two full-time

teachers whose race is different from the race of the majority of the faculty and staff members at the school.

At every school with 12 or more teachers, the race of at least one of every six faculty and staff members will be different from the race of the majority of the faculty and staff members at the school. This Court will reserve, for the time being, other specific faculty and staff desegregation requirements for future years.

C. *Means of Accomplishment.*

If the school board is unable to achieve faculty desegregation by inducing voluntary transfers or by filling vacancies, then it will do so by the assignment and transfer of teachers from one school to another.

D. *Substitute Teachers.*

Commencing March 1, 1968, the ratio of the number of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester.

Commencing with the 1968–69 school year, the board will not use an individual as a substitute teacher in the Montgomery Public Schools if he will consent to substitute only at predominantly white schools or only at predominantly Negro schools.

E. *Student Teachers.*

Commencing March 1, 1968, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system.

F. *Night Schools.*

Commencing June 1, 1968, the ratio of white to Negro faculty members at each night school will be substantially the same as the ratio of white to Negro faculty members throughout the night-school program.

II. NEW CONSTRUCTION

The school board will obtain approval from the State Superintendent of Education prior to letting contracts for or proceeding with the construction of any new school or any additions to an existing school. The State Superintendent will, upon receipt of such proposals, take appropriate action on said proposals as required by the March 22, 1967, decree entered in *Lee, et al.* v. *Macon County Board of Education, et al.*, 267 F. Supp. 458, 470–472, 480–481.

III. TRANSPORTATION

The school board will adopt nondiscriminatory bus routes and criteria governing the availability of bus transportation to students. Race will not be a basis for assigning students to school buses, and overlapping and duplicative bus routes based on race will be eliminated. By June 1, 1968, the school board will file with the Court the criteria it has adopted and a map or maps of bus routes for the 1968–69 school year. Along with the map, the school board will file a report indicating for each bus in its system, the number of students by race that the bus is expected to transport, the capacity of the bus, the number of miles the bus is expected to travel one way, and the school or schools the bus will serve. The board will serve the United States, as amicus curiae, with copies of the criteria, the report, and the map or maps.

IV. JEFFERSON DAVIS HIGH SCHOOL, PETER CRUMP SCHOOL, AND SOUTHLAWN SCHOOL

The school board will take affirmative action to eradicate the effect of the efforts it and its employees have made to create the impression throughout the school system that Jefferson Davis High School, Peter Crump Elementary School and Southlawn Elementary School are to be used primarily by white students. The action will include, but not be limited to, the following steps:

A. *Letter to Eligible Students.*

By March 1, 1968, the school board will send to every student presently enrolled in grades 9, 10 and 11 in the public schools of Montgomery County a letter such as that set forth in Attachment A to this supplementary plan. A copy of the information sheet on choice forms and spring football practice, such as has heretofore been distributed to white students and parents, will be enclosed with each letter addressed to a male student.

B. *Visits to Schools.*

In the company of either the principal or a coach previously assigned to Jefferson Davis High School, that school's new coach will visit each high school and junior high school in Montgomery. They will inform the male students in grades 9, 10 and 11 at those schools of the rules concerning their eligibility to participate in athletics at Jefferson Davis High School. They will also inform the athletes when and where spring football practice is to begin for the new high school and of the procedures they should follow in order to participate. They will also make themselves available to answer any questions these students may have about Jefferson Davis High School.

C. *Transportation.*

The school board will, on the choice forms, offer to provide transportation to Jefferson Davis High School, Peter Crum Elementary School and Southlawn Elementary School, until further order of this Court. The choice forms will indicate that transportation is to be provided to those schools. The school board will provide transportation to each student who chooses Jefferson Davis High School and who lives outside the City of Montgomery and more than two miles from the school and who lives nearer Jefferson Davis High School than either Lee or Lanier High School, in the absence of compelling circumstances approved by the Court on the school board's motion.

D. *Honoring Choices.*

The school board will honor the choice of each Negro student who chooses to attend Jefferson Davis High School during the 1968-69 school year, in the absence of compelling circumstances approved by the Court on the school board's motion.

V. REPORTS

The school board will report to the Court every three months, beginning March 15, 1968, the steps taken to comply with the desegregation plan ordered into effect June 1, 1967, and with this supplementary plan. Plaintiffs and the United States will be served with copies of the reports.

A. *Reports Previously Ordered.*

The school board will include in reports filed each June 15 the "report on choice period" and "report on faculty assignments" described in Part VII of the plan ordered June 1, 1967. The report after school opening, also described in Part VII of the 1967 order, will become part of the reports filed each September 15.

B. *Faculty.*

1. *New teachers.* Each report filed will list each new teacher hired during the preceding three months and give his race and the school to which he is assigned.

2. *Substitute teachers.* Each report will list the number of days taught by substitute teachers, by race and by school, during the preceding three months, with the exception that the report filed March 15, 1968, will give this information only from the date of the order to which this supplementary plan is attached.

3. *Student teachers.* Each report will show by race the number of student teachers assigned during the preceding three months to each school having student teachers.

4. *Night schools.* Commencing June 15, 1968, each report will show by race the number of faculty and staff members assigned to the night program of each school having a night program.

C. *Transportation.*

Each report filed each year on September 15 will show, for each school bus, the number of students transported by race, the capacity of the bus, the number of miles it travels one way, and the school or schools it serves.

D. *Jefferson Davis High School and Other New Schools.*

The reports of March 15, 1968, June 15, 1968, and September 15, 1968, will show the steps the school board has taken to comply with Part V of this supplementary plan.

[Attachment A]

MONTGOMERY PUBLIC SCHOOLS

DATE: _____.

Dear Student:

We are sending you this letter to inform you that you are eligible to attend Jefferson Davis High School if you choose to do so. The choice period for Montgomery County schools begins March 1, 1968, and you or your parents will be receiving a choice form within the next few days.

Jefferson Davis High School is a new school in southeast Montgomery, to be opened in the fall of 1968. A senior high school only, it will have grades ten through twelve. Bus transportation to the school will be available to students who live outside the City of Montgomery and more than two miles from the school provided the student exercising such choice lives nearer Jefferson Davis than either Lee or Lanier High School.

We are in the process of forming a faculty and staff for the new school now. It will include a substantial number of persons of both races.

All students will be welcome to participate in all extra-curricular activities, including athletics and band, on the same basis and without regard to race. Spring football is scheduled to begin March 4, 1968, at Cloverdale Junior High School. Two days before that, Saturday, March 2, at 9:30 a.m., prospective players will be fitted for equipment at the Cloverdale Community Center in Montgomery. All athletes who choose to attend Jefferson Davis High School are

welcome to participate. You should read the enclosed instruction sheet (sent only to male students) if you are interested.

Sincerely,

_____ _____,

Superintendent, Montgomery Public Schools.

Appendix B

In the United States District Court for the Middle District of Alabama, Northern Division

Arlam Carr, et al., plaintiffs

vs.

Montgomery County Board of Education; James W. Rutland, Jr., Fred Bear, George A. Dozier, Dr. J. Edward Walker, Isabelle B. Thomasson and Dr. Robert Parker, Members of the Montgomery County Board of Education; and Walter McKee, Superintendent of Education of Montgomery County, Alabama, defendants,

United States of America, amicus curiae

Civil Action No. 2072–N

Order

The motion of the Montgomery County Board of Education filed herein on February 28, 1968, seeking an order suspending and staying the order and injunction of this Court made and entered in this case on February 24, 1968, is now presented. The submission is upon the motion, the record and the arguments of counsel.

From 1954—when the Supreme Court of the United States put the Montgomery County School Board and other school boards throughout this country on notice that they could not continue under the law to operate a dual school system based on color—until this

Court found it necessary to enter an order on July 31, 1964, requiring commencement of the desegregation of the public schools in Montgomery County, Alabama, the Montgomery County Board of Education had taken no steps and had made no plans whatsoever to comply with the law of this land in the area of school desegregation. Even though ten years had passed when this matter came on for a hearing in 1964, the Montgomery County Board of Education was allowed, by this Court, to proceed with desegregation gradually, for the reason that it was realized that desegregation of the public schools cut across the social fabric of this community and that there would be both administrative and other practical problems for the board to cope with in order to comply with the law. In the first phase of accomplishing desegregation of the public schools—that is, the adoption of a plan, which has been referred to as "paper compliance"—the Board of Education proceeded with the minimum required by the Court, but in a manner that was acceptable. The next stage of the desegregation process—the token desegregation of the schools and faculty—was also accomplished by the Board in an acceptable manner. However, we have reached the point where we must pass "tokenism," and the order that was entered in this case on February 24, 1968, is designed to accomplish this purpose. It was not designed to and was not intended to accomplish, and, if complied with, will not require more than the Supreme Court of the United States and the other appellate courts have held must be accomplished in order to desegregate a public school system.

The Board of Education in its motion to suspend and stay the order of this Court pending appeals—which may take a year or longer—emphasizes certain particular features of this Court's order of February

24, 1968. In some instances the emphasis is misplaced, and certainly that part of the motion which states that the February 24, 1968, order "contains far reaching pronouncements of legal principles heretofore unpredecented in this District and this Circuit" is incorrect—both in law and in fact. The Montgomery board complains about that part of the order requiring assignment and transfer of faculty members, student teachers and substitute teachers according to a fixed ratio based on race. While this Court did state in its order of February 24, 1968, that the "ultimate objective" in faculty desegregation should be, because of the ratio of white to Negro faculty members in the school system, approximately 3 to 2, no schedule was set up to accomplish this "ultimate objective." The United States requested that a definite schedule be outlined for this accomplishment. However, gradualism has been found to work quite successfully in the past in this type case and particularly with the Montgomery County Board of Education, and gradualism is contemplated by this Court in accomplishing this "ultimate objective." What is actually required in the area of faculty desegregation in the high schools for the 1968–69 school year is very little—if any—more than the testimony reflects the school board planned without an additional court order. For instance, the school board presented testimony by Mr. Jack D. Rutland, the school principal for the new Jefferson Davis High School, to the effect that he contemplated hiring approximately 35 teachers, 7 of whom were to be Negroes. Thus, what is now ordered in the way of faculty desegregation as far as the Jefferson Davis High School is concerned is not as much as this Court was led to believe by the board's testimony would be accomplished by the board for the 1968–69 school year without any addi-

tional court order. This also applies to that part of the Court order as now amended requiring faculty desegregation for the other schools in the system. Thus, in the area of faculty desegregation, nothing more is required of the Montgomery County School Board by the order of February 24, 1968, than the law requires as a minimum at this stage of the desegregation process and very little, if any, is required more than the school board, by its testimony, advised this Court it was going to do anyway.

The school board's complaint that the "ratio" requirement is unprecedented is inaccurate. In *Board of Education of Oklahoma City Public Schools* v. *Dowell,* 375 F. 2d 158, 164 (10th Cir. 1967), it was observed that:

> Among the specific recommendations found in the report and *embraced by the trial court's order* were:
>
> * * * * *
>
> (4) Desegregation of all faculty personnel so that by *1970* the faculty ratio of whites to non-whites in each school will be the same as the faculty ratio of whites to non-whites in the entire school system, subject to a reasonable tolerance of approximately 10%. [Emphasis added, footnote omitted.]

The Fifth Circuit has not addressed itself to the means to be employed to fully achieve faculty desegregation. It has approved "racial criteria" in assignments "in fashioning an appropriate remedy to undo past discrimination." *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836, 892 (5th Cir. 1967). The opinion in that case recognized that requiring a percentage ratio of teachers in the system was one method of meeting the problem:

> We anticipate that when district courts and this Court have gained more experience with

> faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant case. 372 F. 2d at 894.

In meeting this problem of faculty desegregation, other district courts have found it necessary to spell out in specific numbers the degree of faculty desegregation required where the local school boards have not proceeded with "deliberate speed." See *Coppedge* v. *Franklin County Board of Education,* 273 F. Supp. 289 (E.D. N.C. 1967); *Kier* v. *County School Board,* 249 F. Supp. 239 (W.D. Va. 1966).

The school board also complains as to that feature of the order relating to transportation. The order as now amended does not require the school board to do anything in the area of transportation of students that is not already required of practically every school in the State of Alabama and particularly each of the 99 schools subject to the order of the three-judge court in *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458. As a matter of fact, that part of the order of this Court of February 24, 1968, that relates to transportation is almost a duplicate of what is required of other schools throughout the State of Alabama in the area of transportation.

That particular feature of this Court's order of February 24, 1968, requiring transportation to the Jefferson Davis High School only requires transportation on the same basis that the school board is already providing it to Lee and Lanier High Schools. As was emphasized in the opinion and order of February 24, 1968, the Montgomery County School Board, according to the preponderance of the evidence, has set out to continue to operate—other than allowing token desegregation—a dual school system based upon race or color. The evidence clearly reflects that the manner in

which this is to be accomplished is by the construction of schools with a limited capacity in virtually all-white neighborhoods. These capacities are not projected with the community growth in mind. The recent trend by the Montgomery board is to limit the capacity of these new schools to the present student population in these white enclaves. To perfect this plan, the school board has declared—before any choices are filed—that no transporation will be provided to the new Jefferson Davis High School, but that transportation will be provided to every other high school in the county. The announced justification for this is that the school will be filled to capacity without transporting any students. Thus, the board will, because of the location of these new schools (Jefferson Davis, Southlawn Elementary and Peter Crump Elementary), when it refuses to honor the choices of students who do not live in these white neighborhoods, be successful in operating exclusively white schools for white communities. At the same time the board has been doing this, it has been enlarging, through expansion programs, the Negro schools; these expansion programs are based upon the projected student growth. Through this means, the "freedom-of-choice plan" will not accomplish desegregation of the school system in Montgomery County, Alabama. *If this system is permitted,* the Montgomery board will be using the freedom-of-choice plan for part of the school system and the neighborhood school plan for another part of the system. The freedom-of-choice plan will be operating for schools such as Lee High, Lanier High, Capitol Heights, Jr. High, Goodwyn Jr. High and others, and these schools will be desegregated. The Jefferson Davis High, Southlawn Elementary and Peter Crump Elementary Schools will be operated on a segregated basis—solely for the

students residing in these exclusively white neighborhoods. The law will simply not permit the operation of such a system.

Furthermore, the evidence in this case is clear that the Jefferson Davis High School has been constructed in an exclusively white, predominantly high income-tax bracket community. To allow the Board of Education of Montgomery County, Alabama, to succeed in such a plan will not only be to discriminate against the Negro children who might elect to attend Jefferson Davis High School, but will also, according to some theories, discriminate against white children who attend desegregated schools.

This Court has ordered no "busing" of students other than requiring the Board of Education to provide exactly the same type transportation and upon exactly the same basis as that already provided by the board to students attending Lee and Lanier High Schools.

The last aspect of this Court's order that the board by its motion considers innovative to the point that the order should be stayed pending appeal is that pertaining to honoring the choices of Negro students who choose to attend Jefferson Davis High School during the 1968–69 school year. As was emphasized in the February 24, 1968, order, the school board, through its agents and by its own practices, had set about to create and had created the impression throughout the system that the new air-conditioned Jefferson Davis High School was to be an exclusively white school. No reasonable conclusion could be reached other than that this was for the purpose of deterring any Negro student in the system from choosing the Jefferson Davis school for the 1968–69 school year. The impression had been created that the school was not available—even though the Mont-

gomery Board of Education is theoretically operating under a freedom-of-choice plan—for anyone except the 850 students of the exclusively white, high-income group that comprise the community where the new school is located. Fairness and justice requires that something be done to counteract this aggravated type of discrimination. The order emphasizes that this feature is a temporary measure—presently designed only to operate during the 1968–69 school year. The order further emphasizes that the choices of Negro students electing to attend Jefferson Davis High School during the 1968–69 school year shall be honored *in the absence of compelling circumstances to be approved by this Court* on the school board's motion. As to this feature of the order—as it has throughout this litigation—reasonableness will govern the Court's action.

When motions to stay orders and injunctions are filed by litigants in any type of litigation, normal judicial procedure requires—as was done in this case—that the motion to stay be presented to the judge entering the order sought stayed. This invariably places the judge in the position of being required to review and appraise his own order; that is the situation now presented. This Court firmly believes that each and every provision and requirement in the order and injunction made and entered in this case on February 24, 1968, is the minimum the applicable law will allow under the peculiar facts and circumstances presented and that each and every feature of the order and injunction entered in this case on February 24, 1968, is not only authorized but required by the applicable law. However, it is not felt that any of the litigants will be prejudiced if certain features of the order to which the Montgomery County Board of Education most strenuously objects are stayed for a

limited time so as to afford the Board of Education a reasonable time to secure appellate review of these features of the order and injunction.

The feature with regard to transportation *generally* (which is, as has been emphasized, required of practically every other school in the State of Alabama), the features as now amended with regard to the desegregation of the substitute teacher program, the student teacher program and the night school program, will not be stayed. These do not even approach new or novel areas. That part of the order requiring the approval of the State Superintendent of Education prior to letting new contracts or expanding existing schools is not novel and will not be stayed. Those portions regarding reports to this Court are not novel and are not to be stayed. That provision of the injunction as now amended relating to faculty and staff set out in Part I, B, will be stayed for a limited period pending an appeal. That provision of the order set out in Part IV, C, relating to transportation to the Jefferson Davis High School, Peter Crump Elementary School and Southlawn Elementary School, will be stayed for a limited time pending appeal. That provision of the order set out in Part IV, D, relating to the honoring of the choices of Negro students who elect to attend Jefferson Davis High School during the 1968–69 school year, in the absence of compelling circumstances approved by the court on the school board's motion, will be stayed for a limited time pending appeal. The remainder of the order, as stated above, will not be stayed.

There is a provision authorizing accelerated appeals where time is of the essence. This Court considers that time is of the essence as to these features of the injunction now being stayed pending this appeal. There is no reason why the school board,

through its attorneys, cannot secure an accelerated hearing of this matter before a panel of the United States Court of Appeals for the Fifth Circuit. In this connection, both the board's and government's attorneys have orally assured this Court that they will seek to expedite the appeal of this case and will, by reason of the time limitations involved, request the Court of Appeals to accelerate the hearing and submission of the case. This will enable these features of the order to be reviewed by the appellate court prior to the commencement of the 1968–69 school year and will also, in the event one or more of the provisions of the February 24, 1968, order are affirmed, enable the school board to put them into effect for the 1968–69 school year. This procedure will allow appellate review of the order before it is scheduled to be effective and will also keep the Negro plaintiffs from being prejudiced by any further undue delay. In the opinion of this Court, five months will be ample time to afford the school board, through its attorneys, an opportunity to secure an appellate review of these matters. Therefore, a stay order as to these features herein enumerated will be entered and the order of this Court of February 24, 1968, as to these enumerated features will not be effective until August 1, 1968. Unless the school board secures an appellate review prior to that date, this stay now being entered will expire on that date. The Clerk of this Court and the official court reporter for this district stand ready to assist the school board in the preparation of the record in this case so as to facilitate the presentation of the matter to the appellate court.

Accordingly, it is the Order, Judgment and Decree of this Court that the effective date for complying with, and making plans to comply with, those provisions in the injunction made and entered

herein on February 24, 1968, set out in Part I, B (faculty desegragation), Part IV, C (transportation to Jefferson Davis High School, Peter Crump Elementary School and Southlawn Elementary School), and Part IV, D (the honoring of choices of Negro students who choose to attend Jefferson Davis High School during the 1968–69 school year) are hereby stayed until August 1, 1968.

Done this the 2nd day of March, 1968.

FRANK M. JOHNSON, Jr.,
United States District Judge.

Appendix C

In the United States District Court for the Middle District of Alabama, Northern Division

ARLAM CARR, ET AL., PLAINTIFFS

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION; JAMES W. RUTLAND, JR., FRED BEAR, GEORGE A. DOZIER, DR. J. EDWARD WALKER, ISABELLE B. THOMASSON AND DR. ROBERT PARKER, MEMBERS OF THE MONTGOMERY COUNTY BOARD OF EDUCATION, AND WALTER MCKEE SUPERINTENDENT OF EDUCATION OF MONTGOMERY COUNTY, ALABAMA, DEFENDANTS

UNITED STATES OF AMERICA, AMICUS CURIAE.

Civil Action No. 2072-N

ORDER AMENDING ORDER AND INJUNCTION OF FEBRUARY 24, 1968

Upon consideration of the defendants' motion to stay the order and injunction made and entered herein on February 24, 1968, and the arguments in support thereof and in opposition thereto, it is considered appropriate, in order to accomplish the intent and purpose of this Court and in order to clarify the order and injunction in certain specific respects, to amend the order made and entered February 24, 1968.

Accordingly, it is Ordered that:

(1) That portion of Part IV, C, reading:

> The school board will provide transportation to each student who chooses Jefferson Davis High School and who lives outside the City of Montgomery and more than two miles from the school and who lives nearer Jefferson Davis High School than either Lee or Lanier High School, in the absence of compelling circumstances approved by the Court on the school board's motion,

is amended to read:

> The school board will provide transportation to each student who chooses Jefferson Davis High School and who lives outside the City of Montgomery and more than two miles from the school and who lives nearer Jefferson Davis High School than either Lee, Lanier, or Montgomery County High School, in the absence of compelling circumstances approved by the Court on the school board's motion.

(2) That portion of Part I, D, reading:

> Commencing March 1, 1968, the ratio of the number of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester,

is amended to read:

> Commencing in September, 1968, with the 1968–69 school year, the ratio of the number of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester.

(3) That Part I, E, reading:

> Commencing March 1, 1968, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system,

is amended to read:

> Commencing in September, 1968, with the 1968–69 school year, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substantially the same as the ratio of white and Negro student teachers throughout the system.

(4) That portion of "Attachment A" to the injunction wherein it is stated:

> We are sending you this letter to inform you that you are eligible to attend Jefferson Davis High School if you choose to do so,

is amended to read:

> We are sending you this letter to inform you that you are eligible to choose to attend Jefferson Davis High School if you desire to do so.

(5) That portion of Part I, B, reading:

> (1) *1968–69.* At every school with fewer than 12 teachers, the board will have at least two full-time teachers whose race is different from the race of the majority of the faculty and staff members at the school,

is amended to read:

> (1) *1968–69.* At every school with fewer than 12 teachers, the board will have at least one full-time teacher whose race is different from the race of the majority of the faculty and staff members at the school.

Done, this the 2nd day of March, 1968.

FRANK M. JOHNSON, JR.,
United States District Judge.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25865

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL,

Appellants,

versus

ARLAM CARR, JR., a minor, by ARLAM CARR, and JOHNNIE CARR, his parents and next friends, ET AL,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

versus

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

Appeals from the United States District Court for the Middle District of Alabama

(August 1, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and ELLIOTT, District Judge.

GEWIN, Circuit Judge: The United States and appellees filed motions in the United States District Court for the Middle District of Alabama on August 17, 1967, and February 7, 1968, requesting the district court to require appellants to take further steps to eliminate the dual school system in Montgomery County, Alabama. Hearings were held on September 5, 1967 and February 9, 1968. The district court entered its order on February 24, 1968, amended March 2, 1968, granting specific relief in the areas of faculty desegregation, student teacher and substitute teacher desegregation, school construction, student transportation, and student choices regarding newly constructed schools. This appeal followed. We affirm the order of the district court as hereinafter modified.

We see no need to recite the history of the school board's efforts to comply with the constitutional mandate to desegregate its public schools. However, we note that progress has been made and that the school board has been complimented on its good faith efforts. We do not wish unduly to emphasize or de-emphasize good faith on the part of this particular board of education, but we do take note of the fact that this is the very first time it has been before this court. This case does not bear the "many service stripes" mentioned in United States v. Board of Educ. of Bessemer, 5 Cir. 1968, ____ F.2d ____ [Nos. 25809, 25810, 25811, June 3, 1968]. *See also* Davis v. Board of School Comm'rs of Mobile, 393 F.2d 690 (5 Cir. 1968).[1] In our view, good

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[1] In *Davis*, the court mentioned the fact that the case involving Mobile schools had been before the Fifth Circuit five times since 1968. 393 F.2d at 691 n.1.

faith conduct on the part of any litigant in any court, especially a court of equity and, more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration. Our feeling with respect to good faith is buttressed by the recent decision of the Supreme Court in Green v. School Bd. of New Kent, ____ U.S. ____, 20 L.Ed.2d 716 (1968).[2] Some five times, during the period from 1964 to 1967, the district court publicly complimented the Montgomery County School Board on its efforts toward achieving desegregation.[3]

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[2]There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in *light of the circumstances present* and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in *good faith* and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, where other, more promising courses of action are open to the board, they may indicate a lack of *good faith;* and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. 20 L.Ed.2d at 724 (emphasis added).

[3]At the conclusion of a hearing on May 25, 1967, the court made the following statement from the bench:

> I would like to say this to you here in the presence of the plaintiffs and the Government lawyers; that I am impressed that the Montgomery County Superintendent of Education and members of the Montgomery County School Board of Education now evidence and have in the past evidenced a desire and intent to operate a school system here in Montgomery County as profes-

It is not necessary to discuss all of the provisions of the district court's order. Appellants challenge that portion of the order which directs them (1) to assign and transfer faculty members, student teachers, and substitute teachers throughout all schools in the system and from one school to another according to a fixed mathematical ratio based on race, and (2) to give affirmative preference to Negro students who choose to attend a newly constructed high school. That part of the court's order challenged on appeal is set forth below:

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sional educators and not as politicians. This present attitude is demonstrated here at this time; this past conduct on the part of these officials has, without any doubt, inured to the benefit of the students regardless of their race, in Montgomery County that seek quality education. And I have observed and I have been impressed that these officials have accomplished this largely through — or this has been accomplished largely through their efforts and without any serious discord or disruption as far as any school is concerned. This, when it is compared with some other similar operations is a considerable feat, for which this community, in my judgment, owes these school officials their appreciation. It evidences a pattern of professional conduct that other systems could, for the benefit of their students, emulate.

Again on September 5, 1967, at the conclusion of a hearing which apparently formed a partial basis for the order now under consideration, the court stated from the bench:

You are dealing here with a school system that you haven't had to take to your appellate courts a single time since you started. It is the only major school system in the State that you haven't had to do it on; that they have done what they have done in good faith, and they had been ahead of most of your other systems in every field.

I. FACULTY AND STAFF

A. *Statement of Objective.*

In achieving the objective of the school system, that the pattern of teacher assignments to any particular school shall not be identifiable as tailored for a heavy concentration of either Negro or white pupils in the school, the school board will be guided by the ratio of Negro to white faculty members in the school system as a whole.

The school board will accomplish faculty desegregation by hiring and assigning faculty members so that in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. At present, the ratio is approximately 3 to 2. This will be accomplished in accordance with the schedule set out below.

B. *Schedule for Faculty Desegregation.*

1. *1968-69.* At every school with fewer than 12 teachers, the board will have at least one full-time teacher whose race is different from the race of the majority of the faculty and staff members at the school.

At every school with 12 or more teachers, the race of at least one of every six faculty and staff members will be different from the race of the majority of the faculty and staff members at the school. This Court will reserve, for

the time being, other specific faculty and staff desegregation requirements for future years.

C. *Means of Accomplishment.*

If the school board is unable to achieve faculty desegregation by inducing voluntary transfers or by filling vacancies, then it will do so by the assignment and transfer of teachers from one school to another.

D. *Substitute Teachers.*

Commencing in September, 1968, with the 1968-69 school year, the ratio of the number of days taught by white substitute teachers to the number of days taught by Negro substitute teachers at each school during each semester will be substantially the same as the ratio of white substitute teachers to Negro substitute teachers on the list of substitute teachers at the beginning of the semester.

Commencing with the 1968-69 school year, the board will not use an individual as a substitute teacher in the Montgomery Public Schools if he will consent to substitute only at predominantly white schools or only at predominantly Negro schools.

E. *Student Teachers.*

Commencing in September, 1968, with the 1968-69 school year, the ratio of white to Negro student teachers each semester in each school that uses student teachers will be substan-

tially the same as the ratio of white and Negro student teachers throughout the system.

F. *Night Schools.*

Commencing June 1, 1968, the ratio of white to Negro faculty members at each night school will be substantially the same as the ratio of white to Negro faculty members throughout the night-school program.

IV. JEFFERSON DAVIS HIGH SCHOOL, PETER CRUMP SCHOOL, AND SOUTH LAWN SCHOOL

D. *Honoring Choices.*

The school board will honor the choices of each Negro student who chooses to attend Jefferson Davis High School during the 1968-69 school year, in the absence of compelling circumstances approved by the Court on the school board's motion.

The district court denied appellees' request that the ratio of white to Negro faculty members in new schools be approximately three to two in their first year of operation. Appellees have cross-appealed on this issue.

I

ASSIGNMENT OF TEACHERS

It is clear from the record and briefs that appellants fully recognize that they have the affirmative duty to

desegregate the faculties throughout their entire school system. They have been striving to carry out this duty by seeking and encouraging voluntary transfers of teachers and by requesting new teachers to accept positions in schools where their race is in the minority. Appellants further recognize that they have the legal right to compel faculty assignment if voluntary placement is not effective.[4] However, appellants object to the district court's order requiring assignment of teachers on the ground that such is not in keeping with sound and quality school administration. We quote from appellants' brief:

> In *Beckett v. School Board of City of Norfolk, Virginia*, 269 F. Supp. 118, at page 139 (E.D. Va. May, 1967) the Court stated, in considering faculty desegregation:
>
> > However, in line with the most recent Wheeler case [Wheeler v. Durham City Board of Education, 363 F.2d 738], the School Board has not adopted

[4]Although appellants consistently argue for voluntary assignment of teachers and staff and contend that "sound and quality school administration" favors voluntary assignment, the following statement from appellants' brief shows clearly that they recognize their obligation:

> These appellants fully recognize that they have the affirmative duty to desegregate the faculty throughout this school system to the end that "the pattern of teacher assignment to any particular school shall not be identified as tailored for a heavy concentration of either Negro or white pupils in the schools." (R.p.370 and *U.S. v. Jefferson County Board of Education*, 372 F.2d 836; aff'd en banc, 380 F.2d 385) The appellant recognizes further that they have the legal right to compel faculty assignment if voluntary placement is not effective.

> the tactic of compelling a teacher to transfer. *Moreover, such a practice would not be in accord with sound educational principles.* (Emphasis supplied)

The question of whether a school board is obligated to assign teachers to schools where their race is in the minority when efforts to persuade teachers voluntarily to accept such positions fail, has recently been before this court. United States v. Board of Educ. of Bessemer, *supra*. That opinion answers the above question with an emphatic *yes*. We quote:

> The School Boards do not meet their duty by soliciting volunteers. For the fact remains that the "responsibility for faculty desegregation, just as the responsibility of student desegregation, lies ultimately with the board, not the teachers." Davis v. Board of School Commissioners of Mobile County, 5 Cir. 1968, 393 F.2d 690. So there will be no mistake about it we spell out that *Jefferson* stands for the proposition that there is an affirmative duty on the part of the School Boards to do everything — the word is everything — within their power to meet the decree-imposed complete desegregation of faculties. It is not, it cannot be, left to the voluntariness of teacher applicants or transfers.

We therefore find no error in the court's order requiring the assignment of teachers since efforts to achieve faculty desegregation by voluntary means have failed.

II

FIXED MATHEMATICAL RATIO

Appellants strenuously object to the imposition of the mathematical ratios contained in the district court's order. They contend that such ratios are arbitrary and unwarranted in view of their extensive plans to desegregate their faculties, their showing of good faith, and the overall achievement of progress in the area. In addition, appellants submit that a fixed ratio does not take into consideration the availability of teaching personnel or the complexity of school administration, and that it ignores the goal of quality education and other similar factors which are inevitably involved in the operation of a school system.

After extensive hearings, the court below found that desegregation of faculties in the Montgomery County school system was lagging and that appellants had failed to comply with earlier orders of the court requiring full faculty desegregation. In order to remedy the lack of faculty integration, the court imposed specific targets for the school year 1968-69 and, more specifically, delineated what would be required for satisfactory compliance. Thus, under the district court's order for the school year 1968-69, most schools in Montgomery County must have roughly one-sixth of the faculty and staff of a race different from that of the other five-sixths. The school board will have achieved full compliance when the ratio of white to Negro teachers is three to two in each school. At the outset we note that

the testimony of school officials indicates a need for specific directives in the instant case.[5]

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[5]The following is an excerpt of the testimony of Associate Superintendent W. S. Garrett:

Q. As part of your duties, have you been given the responsibility, primarily, of carrying out faculty desegregation?

A. Well, the superintendent has delegated the recommending of the best faculty members that I can come by, and desegregation is a large — our faculty is a large part of my responsibilities; not the only one, but that has been discussed and — with the Board and with the superintendent, and we have a plan to accomplish this, have been working on it all year.

Q. Well, under your plan, when do you estimate that faculty desegregation will be finally accomplished in terms of the objective of the court order removing —

A. Well, now, that is something I don't know, because I don't know what the objectives of the court order are. That has never been laid down in any percentage fashion that I know of. It says that you will have reasonable desegregation of faculty and that you will strive toward having each faculty not recognizable as being staffed for a particular race. That is what I get out of it.

Q. Well, let —

A. So I — I can't — this court order is in fairly general terms; I can't answer that question.

Q. Well, you made the statement about having schools staffed so that they will not be recognizable as for a particular race; when do you expect that that will be accomplished?

A. Well, that would depend on what the Board's definition of that is, the court's definition of that.

Q. Do you have a definition of that?

A. Not at this point; we have discussed that many times, and I do not have a definition of — of what that would mean.

Q. No one has told you, given you a definition in terms of mechanics, in terms of numbers, none of your superiors?

A. No, as far as I know, no other school personnel man

In United States v. Jefferson County Board of Educ., 372 F.2d 836 (5 Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5 Cir. 1967), *cert. denied*, 389 U.S. 840 (1967), we dealt with faculty desegregation. Following *Jefferson* the question of faculty desegregation has recently been before this court on at least three separate occasions. Stell v. Board of Educ. of Savannah, 387 F.2d 486 (5 Cir. 1967); Davis v. Board of School Comm'rs of Mobile, *supra;* and United States v. Board of Educ. of Bessemer, *supra*. We have continued to emphasize the responsibility of school boards in achieving effective faculty desegregation. We have emphasized the desirability of their doing so because of their expertise in the field of education. Nevertheless, we nave made it clear that it is the duty of district courts to require specific target dates and accomplishments in order to ensure full compliance with all deliberate speed. Moreover, it is clear from recent decisions of the Supreme Court that the type of plan under which school boards should operate is a plan which works. Green v. County Bd. of New Kent, *supra;* Monroe v. Board of Comm'rs of Jackson, ____ U.S. ____, 20 L.Ed. 2d 733 (1968); Raney v. Board of Educ. of Gould, ____ U.S. ____, 20 L.Ed.2d 727 (1968).*

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in America has. I have talked to many of them. What we are striving to do is to make progress and keep going and hope that somewhere along the line we will have achieved the — what the court has in mind. But if you will look at that court order, you will see it doesn't lay down the precise terms exactly what that means; it is a broad definition.

*In both *Green* and *Monroe* faculty integration was an issue before the district courts and the courts of appeals. The Supreme Court made no pronouncement with respect to faculty integration but apparently left that decision to the district courts

Immediately following the *Brown* decisions,[7] emphasis was placed on the desegregation of schools from the point of view of the students. Faculty and staff desegregation are more recent. While it is obvious that we cannot tolerate the delay which has been experienced with respect to the desegregation of students, the decisions, in dealing with faculty and staff, have indicated "the likelihood of some lessons being learned from experimentation."[8] In the case *sub judice*, the district court concluded that Montgomery County had not fully complied with its orders to effectuate desegregation of faculty, that the plan under which the school board had sought to integrate the faculty was

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involved under the remand orders of the Courts of Appeals in the two cases. The following is from the *Green* decision:

> The Court of Appeals for the Fourth Circuit, en banc, 382 F.2d 326, 338, affirmed the District Court's approval of the "freedom-of-choice" provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty "which is much more specific and more comprehensive" and which would incorporate in addition to a "minimal, objective time table" some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in United States v. Jefferson County Board of Education, 372 F.2d 836, aff'd en banc, 380 F.2d 385 (1967).

20 L.Ed. at 722.

In *Monroe* the Supreme Court stated:

> The Court of Appeals for the Sixth Circuit affirmed except on an issue of faculty desegregation, as to which the case was remanded for further proceedings.

20 L.Ed.2d at 738.

In *Raney* the Court stated: "Faculties and staff were and are segregated." 20 L.Ed.2d at 730. Faculty segregation or integration is not mentioned further in the opinion.

[7] Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954), and Brown v. Board of Educ. of Topeka, 349 U.S. 294 (1955).

[8] *See* United States v. Board of Educ. of Bessemer, *supra*; United States v. Jefferson County Bd. of Educ., *supra* at 894.

not adequate, and, therefore, that another more specific plan was necessary.

It is our conclusion that the standards fixed by courts with respect to faculty desegregation cannot be totally inflexible. In none of the three recent cases cited above, *Stell*, *Davis*, and *Bessemer*, has this court required faculty integration according to a numerical or racial percentage ratio. On the contrary, we have declined "to enhance Jefferson's demands."[9] We do not intimate that there must always be a slavish and unswerving adherence to the precise requirements of *Jefferson*, but generally we have avidly embraced the idea of circuit-wide uniformity and have declined "to tinker with the model decree."[10] As a matter of fact, after the decision of the district court in this case, we have actually rejected the idea of requiring mathematical or racial percentage ratios in dealing with faculty and staff. We quote from the *Bessemer* decision:

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[9] *See* United States v. Board of Educ. of Bessemer, *supra*.

[10] As we pointed out in United States v. Board of Educ. of Bessemer, *supra*:

> We must steel ourselves against the importunities to import inequality by judicial modifications to meet some supposed need of a locality. One immediate consequence of such a practice would be to encourage others to try their hand. And soon we'd be back in the school business again — a role for which we are not equipped or competent to handle. The efforts to reduce the demands of *Jefferson* we've resisted so far. *See, e.g., Barnhardt v. Meridian Municipal Separate School Dist.*, 5 Cir. 1968, ——— F.2d ——— [No. 25083, April 24, 1968]; *Gaines v. Dougherty County Board of Education*, 5 Cir. 1968, ——— F.2d ——— [No. 25776, March 14, 1968]; *Stell v. Board of Public Education for the City of Savannah*, 5 Cir. 1967, 387 F.2d 486 [No. 23724, December 4, 1967].

> We are requested to do both too much and too little. The school boards with a sincerity of counsel we do not question, urge us, in effect, to do nothing specific either in terms of target dates or racial percentage ratios, or both. The government, on the other hand, proposes that we direct the entry of a proposed sweeping, detailed decree which it frankly acknowledges adds to and extends *Jefferson*. We think neither alternative is wise.

We stated further:

> Even though *Jefferson* was more equivocal on faculty integration and expressed the likelihood of some lessons to be learned from experimentation, we think we should apply an even hand to deny requests to enhance *Jefferson's* demands.

The decree under review states that schools with twelve or more faculty members must begin the school year 1968-69 with at least one of every six faculty and staff members being of a different race from the majority. Because of the difficulties inherent in achieving a precise five-to-one ratio, this part of the district court's order should be interpreted to mean *substantially* or *approximately* five to one. The decree is modified to this extent in order to allow a degree of flexibility in the application of the 1968-69 interim requirements.

Additionally, whether the school board is in full compliance should not be decided solely by whether it has achieved the requisite numerical ratios.[11] The assignment of faculty and other staff to particular schools need not mirror the total faculty of the entire system as related to race or color. There must be a good faith and effective beginning and a good faith and effective effort to achieve faculty and staff desegregation for the entire system. Although a ratio of substantially or approximately five to one is a good beginning, we cannot say that a ratio of substantially three to two, simply because it mirrors the racial balance of the entire faculty, must be achieved as a final objective.[12] Consideration must be given to the avail-

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[11]Various district courts have entered orders that contain specific standards and at least one appellate court has approved such an order. Coppedge v. Franklin County Bd. of Educ., 273 F. Supp. 289 (E.D.N.C. 1967); Kier v. County School Bd. of Augusta, 249 F. Supp. 239 (W.D.Va. 1966); Board of Educ. of Oklahoma City v. Dowell, 375 F.2d 158 (10 Cir. 1967). Also, though the Eighth Circuit refrained from imposing an exact formula in Kelley v. Altheimer, 378 F.2d. 483 (1967), it specifically called the district court's attention to percentage formulas set by other district courts.

[12]After the decision in Kelley v. Altheimer, *supra* note 11, the Eighth Circuit decided the case of Yarbrough v. Hulbert-West Memphis School Dist., 380 F.2d 962 (8 Cir. 1967). In *Yarbrough* that circuit rejected the idea of a mathematical formula and a fixed timetable and placed this interpretation upon its prior decision in *Altheimer:*

> We say in passing that this panel does not regard *Altheimer* as imposing any rigid mathematical formula which, in certain situations, could itself be arbitrary and without educational significance. We regard that case as one requiring a reluctant school board to get on with its task of achieving faculty and staff desegregation and assignment to comport with equitable and constitutional requirements divorced from racial con-

ability of teaching personnel, sound school administrative procedure, and other important factors. Consequently, under the facts and in the circumstances of this case, the order will be modified accordingly and the numerical ratios set forth in the district court's order and decree will be eliminated. This modification does not affect the five-to-one interim ratio for the school year 1968-69 as hereinabove modified.

Nothing we say in this opinion shall be construed to mean that we authorize, permit, approve or condone the consideration of race or color as a factor in the employment, assignment, reassignment, promotion, demotion or dismissal of full-time teachers, substitute teachers, student teachers or other professional staff members except to the extent that the same may be taken into account for the purpose of counteracting or correcting the effects of racial segregation in any dual school system. Any conduct by any school board which is based on racial discrimination is unauthorized, disapproved and will not be tolerated. It is hoped and believed that experience will teach effective ways and means of achieving an ideal racial balance. School boards must not use excuses to delay the achievement of full faculty and staff desegregation. They have the responsibility and should exercise the ingenuity to achieve a proper racial balance. We have repeatedly asserted that school boards are better equipped to achieve these aims than are the courts; but, if they

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siderations. Numbers and percentages per se are not the ultimate answer but, up to a point, they touch upon realities. This, we think, is the significance of *Altheimer*.

fail or refuse to act, they should now fully realize that the courts will require action.

III

JEFFERSON DAVIS HIGH SCHOOL

From the evidence presented the district court found that the newly constructed Jefferson Davis High School, scheduled to commence operations by the 1968 school year, further perpetuated the dual-school system. More specifically, the court found that the location of the school in a substantially all-white neighborhood, the enrollment capacity of the school, the publicity surrounding the recruitment of white personnel, and the scheduling of athletic events established the new high school, from its very inception, as a "white" school. Indeed, the court found that the conduct of the school board relating to the new high school was "most aggravating." In order to combat the actions of school authorities and to eradicate the impression that the new air-conditioned Jefferson Davis High School was to be an exclusively white school, the district court decreed that the school board will honor the choice of each Negro student who chooses to attend Jefferson High during the 1968-69 school year.

Appellants contend that requiring affirmative racial preference to be given to Negro students for attendance in the Jefferson Davis High School is unwarranted. They submit that the school board did not plan the new high school exclusively for white children. They state in their brief that the school board's current plans call for the employment of seven Negro

teachers in the school. Further, they point to the fact that the school will open on a "freedom of choice" basis. To date 150 Negro students have chosen to attend the high school which has a capacity of 967 students. Appellants state to the court in their brief that these Negro choices will be honored in accordance with the provisions of the school board's plan.

We have examined the record and conclude that the findings of the district court that various actions on the part of appellants created the impression that the Jefferson Davis High School was intended to serve a predominately white student body is supported by some evidence. We conclude that the district court's decree was designed to overcome the impact of the school board's discriminatory conduct as found to exist by the court. The decree requires the school board to honor the choice of each Negro student "in the absence of compelling circumstances approved by the court on the School Board's motion." We cannot be certain as to the court's intended meaning of the term "compelling circumstances." We interpret the term to embrace those reasons which are inherent in and are supported by proper standards of sound school administrative procedure, giving due consideration to all factors and circumstances which are proper to be considered in passing upon such choices.

IV

FACULTY RATIOS IN NEWLY CONSTRUCTED SCHOOLS

Appellees contend that the district court committed

error in not requiring immediate compliance with the three-to-two ratio in schools which will commence operation in 1968. They submit that there would be fewer administrative problems if complete faculty desegregation were achieved at the inception of a new school. However, in the court's order of March 2, 1968, it spoke approvingly of permitting the school board to achieve the ultimate objective of a completely desegregated school system *gradually*. The court stated that gradualism had been found to work quite successfully in the past and that gradualism was contemplated by the court in accomplishing the ultimate objective. We cannot say that the court's decision to refrain from requiring full faculty integration in new schools is erroneous.

The order of the district court is affirmed as herein modified. The Clerk is directed to issue the mandate forthwith.

AFFIRMED AS MODIFIED.

THORNBERRY, Circuit Judge, concurs except as to the modifications of numerical ratios and reserves the right to dissent as to such modifications at a later date.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 25865

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL,

Appellants,

versus

ARLAM CARR, JR., a minor, by ARLAM CARR, and JOHNNIE CARR, his parents and next friends, ET AL,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

versus

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL,

Appellees.

Appeals from the United States District Court for the Middle District of Alabama

(October 21, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and ELLIOTT, District Judge.

THORNBERRY, Circuit Judge, dissenting:

The imposition of a specific ratio for each school as the ultimate objective of faculty integration is a new step for this Circuit, but it represents the considered judgment of a district judge who was familiar with the Montgomery schools, had heard testimony, and was making an honest effort to advance the conversion to a unitary racially nondiscriminatory system as required by the Constitution. Having found the objections to this part of the decree rather unpersuasive,[1] I would affirm the district court. To the extent that the majority have entered modifications, I respectfully and in all deference dissent.

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[1]The school board acknowledges that it must desegregate faculty so that no school is identifiable as being tailored for a heavy concentration of Negro or white students, but says that specific ratios are not required by the cases and would be achieved at the cost of quality education. Also, it is predicted that there will be a general exodus of teachers to other parts of the state. The latter point seems to assume that which is not the case, namely, that school boards in other parts of the state are not obligated to integrate the faculty of each school. As I try to show by this dissent, nothing in the cases precludes numerical ratios. Indeed, the cases require district courts to devise specific provisions to implement the general requirements of *Jefferson*. The final argument that quality education will be sacrificed seems to be based more on speculation than evidence. I would point out that the district court's order requires by way of a final objective that the ratio of white to Negro teachers in each school be "substantially the same as it is throughout the system." Once the job has been largely accomplished, i.e., once the three-to-two ratio has been approached in each school, I think the language of the decree leaves room for flexibility based on administrative necessity.

In *Jefferson County*, this Court stated the importance of faculty integration as forcefully as our language permits:

> Yet until school authorities recognize and carry out their affirmative duty to integrate faculties as well as facilities, there is not the slightest possibility of their ever establishing an operative nondiscriminatory school system.

372 F.2d at 892. The general obligations of local boards were articulated, but the formulation of more specific provisions, *i.e.*, provisions that would ultimately get the job done, was left to the boards and district courts:

> It is essential that school officials (1) cease practicing racial discrimination in the hiring and assignment of new faculty members and (2) take affirmative programmatic steps to correct existing effects of past racial assignment. *If these two requirements are prescribed, the district court should be able to add specifics to meet the particular situation the case presents.* (Emphasis added)

372 F.2d at 893. In this case, the district judge saw in the record a lack of progress in the crucial area of faculty integration[2] and a need for specific directions. His solution was to set a three-to-two ratio as the ultimate objective for each school, and I see no basis in the record or the cases for modifying his determination. To be sure, he was experimenting, but I believe

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[2]The latest figures indicate that 39 of 1,365 teachers in the system are teaching in schools of the opposite race.

this to be experimentation within the spirit of *Jefferson County*.

I do not regard *United States v. Board of Education of Bessemer* as good authority for eliminating the numerical ratios. While language in that opinion suggests the Court was not disposed to deviate in either direction from the *Jefferson* decree, it must be remembered that the district judge had not directed the board to go beyond the stage of allowing voluntary transfers of teachers willing to teach in schools of the opposite race. Being unfamiliar with the school system and having before it a record over a year old, the appellate court could do no more than impose the *Jefferson* decree with emphasis on the point that the school board must reassign teachers if the desired results are not achieved through voluntary transfers. Unlike a district judge who has detailed first-hand knowledge of schools and school officials in his area, our Court simply is not equipped at this time to determine specific objectives. Where a district Judge has formulated specific provisions on the basis of a record, it is contrary to our decisions to eliminate them in favor of more general provisions. As stated by this Court in a civil rights case of another kind, a district court "has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Pullum v. Greene*, 5th Cir. 1968, ____ F.2d ____ [No. 25389, June 18, 1968], quoting from *Louisiana v. United States*, 380 U.S. 145 at 154, 85 S.Ct. 817 at 822.

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versus

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Appellees.

Appeals from the United States District Court for the Middle District of Alabama.

ON PETITIONS FOR REHEARING EN BANC

(November 1, 1968)

Before GEWIN and THORNBERRY, Circuit Judges, and ELLIOTT, District Judge.

PER CURIAM: The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petitions for Rehearing En Banc are also DENIED.

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, CLAYTON* and MORGAN, Circuit Judges.

BROWN, Chief Judge, with whom WISDOM, THORNBERRY, GOLDBERG, and SIMPSON, Circuit Judges join, dissenting:

I dissent from the denial of the rehearing en banc.

In pursuing the ideal of Circuit-wide uniformity which is enhanced by tinkering as little as possible "with the model decree" of *Jefferson I* and *II*[1] as was

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*Judge Clayton did not participate in the vote on rehearing en banc due to illness.

[1]United States v. Jefferson County Board of Educ., 5 Cir., 1966, 372 F.2d 836 (Jefferson I) *aff'd en banc*, 5 Cir., 1967, 380 F.2d 385 (Jefferson II), *cert. denied sub nom.*, Caddo Parish School Bd. v. United States, 1967, 389 U.S. 840, ——— S.Ct. ———, ——— L.Ed.2d ———.

so recently reiterated in *Bessemer*,[2] the panel decision mistakenly concludes that *Bessemer* holds that *Jefferson* and the model decree forbid the District Judge from fixing numerical-percentage ratios of teacher integration. The mistake is unfortunate because in the name of uniformity it begets disparity, not just Circuit-wide, but within the single state of Alabama.

Certainly *Jefferson* lays no such restraint on the District Judges who are on the firing line — just the opposite was declared. "We anticipate that when district courts and this Court have gained more experience with faculty integration, the Court will be able to set forth standards more specifically than they are set forth in the decrees in the instant cases. * * * [T]he district court should be able to add specifics to meet the particular situation the case presents." Jefferson I, 372 F.2d at 893-94.

Any such prohibition would be out of character with the dominant theme so simply expressed and which has now both weathered the storm of certiorari and enjoys the judicial compliment of acceptance. For we there declared, "The only school desegregation plan that meets constitutional standards is one that works." Jefferson I, 372 F.2d at 847.[3]

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[2] United States v. Board of Educ. of Bessemer, 5 Cir., 1968, ——— F.2d ———, [No. 25809, June 3, 1968].

[3] Different only in phrasing was this statement:

> "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration?" 372 F.2d at 894.

And in May 1968 — two months before *Carr* — that is exactly what the Supreme Court said in *Green*:[4] "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*." ____ U.S. at ____, 88 S.Ct. at ____, 20 L.Ed.2d at 724.

Unfortunately, if not tragically, the panel's decision recognizes that the School Board's indefinite plan *will not work*. "At the outset we note that the testimony of school officials indicates a need for specific directives in the instant case."[5] As corroboration of this candid confession the Court then footnotes (n. 5) extensive testimony of a responsible member of the school board. Superintendent Garrett explicitly states that he does not even know what the objectives of the earlier District Court order are, when faculty desegregation will be complete, and that he and the Board have been unable to arrive at a workable definition of the model decree's standard of a "faculty not recognizable as being staffed for a particular race."

Specifics are needed. Specifics are needed by the school administrators. Specifics are needed by the Negroes who have waited these 14 years for "a bona fide unitary system where schools are not white schools or Negro schools — just schools"[6] — and who must now wait for an undefined time for the tell-tale mark

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[4]Green v. County School Bd. of New Kent County, Va., May 27, 1968, ____ U.S. ____, 88 S.Ct. 1689, 20 L.Ed.2d 727.

[5]Montgomery Bd. of Educ. v. Carr, 5 Cir., 1968, ____F.2d____, ____ [No. 25865, August 1, 1968, slip opinion at 10-11].

[6]Jefferson I, *supra*, 372 F.2d at 890.

of segregated faculties to pass away. Specifics are needed by children, Negro and white alike, who are entitled to witness, feel, and participate in the continuing lesson of a constitutional order that is color free.

Specifics — imperatively needed — are not forbidden by *Bessemer*.

The language the Court there used[7] was geared very carefully to that case. The decree proposed by the Government had never been submitted to the District Judge. It was a decree for us as a Court of Appeals to enter as a binding mandate on the District Judge. Worse, it was a decree constructed on assumed racial statistics and ratios for application over a period of three years in no way covered or substantiated by a record which was then over a year old and stale, if not silent, on what had been happening.

But it is a mistake to think that this was an acquiescence in the Board's suggestion that it all be left as it had been in the past — and now seems to be left for Montgomery — to the good faith efforts of the school board.

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[7] "We are requested to do both too much and too little. The school boards * * * urge us, in effect, to do nothing specific either in terms of target dates or racial percentage ratios, or both. The government, on the other hand, proposes that we direct the entry of a proposed sweeping, detailed decree which it frankly acknowledges, adds to and extends *Jefferson*." Bessemer, *supra*, ——F.2d at —— [No. 25809, June 3, 1968, slip opinion at 11].

But we did do four things. The first was to rule out the voluntary approach. The second was to fix an immediate target date, for the School Board to report specifically what it had done and would do for the school year 1968-69. The third was to fix the date — implicit in *Jefferson* — for full compliance, as the beginning of the school year 1970-71. Fourth, we declared that since Negroes were not to be required to wait until "C-day" — 1970-71, to see the evidence of compliance, we sounded in the plainest of words that *specifics* were now the order of the day. Specifics in June-August for the school year 1968-69. More so, specifics for the succeeding year 1969-70, leading to the climax of September 1970.[8]

Loath as Judges are to articulate constitutional goals or actions in the oft-disparaged mechanical terms of arithmetic, this is an area where it is not the spirit, but the bodies which count. Any less inevitably leaves performance to good faith. Good faith is, of course, needed. But good faith is not, and cannot be, the standard. Now, and each term, each school year it comes down to figures. The result is in figures. If the result is satisfactory it is because of numbers, not

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[8] "This leaves the problem of the ultimate 'C Day.' We think it entirely consistent with *Jefferson* to say that full compliance should be reached by the opening of the school year 1970-71. But since that is just two school years away and neither the Court nor the Negro plaintiffs should have to run the risk of an announced failure on the eve of school opening in 1970-71 it is perfectly evident that the District Judge in the forthcoming June-August proceedings must exact or impose specific targets. That will be repeated, only more so, as time marches on into 1969, then into 1969-1970." Bessemer, *supra*, ——F.2d at —— [No. 25809, June 3, 1968, slip opinion at 16].

the effort or subjective motivation. If the result is unsatisfactory it is likewise because of numbers. The numbers — i.e. the numerical percentage ratios — need to be fixed. Once fixed, the Court can always determine whether a good faith effort of compliance has been made. But good faith there is relevant to compliance, not as an element in fixing the standard.

The statistics in this record are abundant and graphic. Without passing judgment on motives or performance the figures of February 1968 either undisputed or found by the Court show that integration of the student body under the freedom of choice plan has been slight.[9] Faculty integration reveals a similar lack of numerical progress much of which, the District Judge expressly finds, is a result for which the Board must bear the full responsibility.[10]

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[9]The District Court found that of 25,000 white children and 15,000 Negro children, there were approximately 550 Negro children attending traditionally white schools. No white children were attending traditionally Negro schools. These facts, as to which there is no substantial contradiction, as well as the facts and quotations in n.10 are from the Memorandum Opinion of the United States District Court for the Middle District of Alabama, filed February 24, 1968.

[10]The teacher force comprised approximately 550 Negro teachers and 815 white teachers. Only 32 classroom teachers in the system were teaching pupils in schools that were predominantly of the opposite race. "Practically all the faculty desegregation in the system has occurred in the high schools. While there is some faculty desegregation in the elementary schools in the system, it is extremely small. There has been very little, if any, faculty desegregation in the schools located outside the City on Montgomery." Of the 26 white teachers hired since September 1967, only 6 or 7 have been placed in predominantly Negro schools. All six Negro teachers hired since that date were assigned to predominantly Negro schools. "The evidence further reflects that the defendants have failed to take any appropriate

After extensive hearings, the District Court, dissatisfied with this lack of demonstrable accomplishment, imposed specific targets for the school year 1968-69 and more specifically, delineated what would be required for satisfactory compliance in order to achieve full faculty integration. The system-wide ratio of white to Negro faculty members is approximately 3 to 2. To attain schools unidentifiable as to race the Judge laid down the standard of a system-wide faculty ratio of 3 to 2. For the school year 1968-69 the Court set an interim compliance ratio of 5 to 1. In addition, the District Court imposed for the 1968-69 school year, the system-wide 3 to 2 faculty ratio for use in assigning substitute teachers, student teachers, and night school faculty members (using the night school faculty ratio).

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steps to insure that substitute teachers are placed on a nonracial basis. No Negro has yet been a substitute teacher in a traditionally white school in Montgomery County." During the 1967-68 school year, white substitute teachers were employed over 2,000 times—only 33 of them in traditionally Negro schools. "Defendants have adopted no adequate program for the assignment of student teachers on a desegregated basis. None of the approximately 150 students teachers used in the Montgomery County School System in the fall of 1967 were assigned to schools predominantly of the opposite race. Four Negro student teachers have very recently been assigned to predominantly white schools. There has been no faculty desegregation in the night schools, operated by the Montgomery County School System." Moreover, on findings, not here challenged, the record failed to show any excuse for this lack of tangible accomplishment. "The evidence does not reflect any real administrative problems involved in immediately desegregating the substitute teachers, the student teachers, the night school faculties, and in the evolvement of a really legally adequate program for the substantial desegregation of the faculties of all schools in the system commencing with the school year of 1968-69." See n. 9 *supra*.

But much of this was, I fear, undone by the panel. Recognizing in so many words the necessity for "specific directives in the instant case" the Court's opinion does not afford that guidance and, worse, makes drastic alterations in the Trial Judge's record-based, carefully constructed program. Although the change in the formulation of the 1968-69 ratio of 5 to 1[11] may be slight in operative effect it does not stand alone. Completely eliminated is the 1968-69 ratio of 3 to 2 for substitute, student, and night school teachers. More significant is the complete elimination of the 3 to 2 ratio as the *Jefferson* goal of a school "unidentifiable as to race." Indeed, it is rejected for all time under the vague notions[12] which permit subjective discrimination of the kind so characteristic of the regional glacial movement toward integration. Right along with this is the failure, either on original disposition or now in response to an express request n the motion for rehearing, that full compliance be required by the opening of the school year 1970-71 as fixed by "C day" in *Bessemer*.

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[11] "Because of the difficulties inherent in achieving a precise five-to-one ratio, this part of the district court's order should be interpreted to mean *substantially* or *approximately* five to one. The decree is modified to this extent in order to allow a degree of flexibility in the application of the 1968-69 interim requirements." Carr, *supra*, ——F.2d at —— [No. 25865, August 1, 1968, slip opinion at 15).

[12] "Although a ratio of substantially or approximately five to one is a good beginning, we cannot say that a ratio of substantially three to two, simply because it mirrors the racial balance of the entire faculty, must be achieved as a final objective. Consideration must be given to the availability of teaching personnel, sound school administrative procedure, and other important factors." Carr, *supra*, ——F.2d at —— [No. 25865, August 8, 1968, slip opinion at 16-17].

Within scarcely 90 miles that separates the Birmingham area from Montgomery there are two separate standards and, perhaps, two separate hopes.

We owe both to those to be commanded by, and those who enjoy the benefit of, court direction, an obligation to speak with a single voice. Whatever might be the ultimate views on the merits, law and all suffer when the Court, from "an inability to muster a majority,"[13] cannot make up its institutional mind.

DYER, Circuit Judge:

I join in dissenting to the denial of a rehearing en banc.

[13]Carter v. United States, 5 Cir., 1963, 325 F.2d 697, 707 (en banc) (dissenting opinion), *cert. denied*, 1964, 377 U.S. 946, ——S.Ct. ——, 12 L.Ed. 2d 308.

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